Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

KYLE RAINEY,

Petitioner,

vs.

BEN VARNER *et al.*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-1714

KYLE RAINEY,

Appellant

v.

BENJAMIN VARNER, Superintendent;
THE DISTRICT ATTORNEY OF THE COUNTY
OF
PHILADELPHIA; and THE ATTORNEY
GENERAL OF THE STATE OF PENNSYLVANIA,

Before: FUENTES and FISHER, *Circuit Judges*;
and KANE,* *District Judge*.

OPINION OF THE COURT

FUENTES, *Circuit Judge*:

In 1994, Kyle Rainey, Nathan Riley, and two co-conspirators robbed a jewelry store in Philadelphia. During the robbery, Riley shot and killed the store owner. Following a seven-day trial, the jury found Rainey guilty of first degree murder, two counts of robbery, and other related charges. After the jury deadlocked on whether to impose the death penalty for first degree murder, the sentencing court imposed a mandatory term of life

in prison. Rainey seeks habeas relief contending that his trial and appellate counsel were ineffective for failing to challenge his first degree murder conviction on the ground that the evidence was insufficient to prove his shared intent to kill.

Because the evidence at trial was sufficient to prove second degree murder and because a conviction for second degree murder in Pennsylvania results in a mandatory life sentence, the same sentence that Rainey is now serving, we discern no prejudice under *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Accordingly, we will affirm the District Court's denial of habeas relief.

I.

Rainey is currently incarcerated at a state correctional facility in Dallas, Pennsylvania. On June 1, 1994, Rainey robbed Sun Jewelers with three co-conspirators: Nathan Riley, Maurice Everett, and Darrell Wallace. Rainey, Riley, and Everett approached the store together; Rainey remained outside while Riley and Everett entered the store through the front door, which was held open with a string. Bystander Al-Asim Abdul-Karim was watching from across the street; the three men caught his attention because of their "hurried" manner and because Riley was wearing a long-sleeved jacket and gloves on a warm day. According to the testimony of Mahlee Kang, one of the proprietors of the jewelry store, after Riley and Everett entered the store, Riley shouted "don't move" and pointed a .38 caliber semi-automatic handgun at her. A few seconds later, Riley aimed the gun at her husband, Sun Kang, and shot him in the neck, killing him.

At some point after Riley and Everett entered the store, Rainey lifted the string and

closed the door, causing it to lock automatically. It is contested, however, whether Rainey closed the door before or after Riley shot Sun Kang. Abdul-Karim testified that "*as the door was closing*, I could hear somebody say 'don't move,' and an individual . . . had his hand up in the air with what appeared to be a pistol. And following that, I heard a discharge of a weapon." (*Id.* at 12) (emphasis added). On direct examination, Mahlee Kang testified that "my husband was lying on the floor . . . but the man took the string out and he was closing the door." (*Id.* at 106; *see also id.* at 146–47.) On cross examination, however, defense counsel showed Mahlee Kang a statement that she made to a detective shortly after the robbery in which she said that Rainey "lifted the string and let the door close, but he didn't come in the store. I don't know where he went after the door shut because that was when the boy with the gun shot my husband." (*Id.* at 147.)

Riley continued pointing the gun at Mahlee Kang while Everett grabbed jewelry and put it in a bag. They left the store and got into a blue car that was double-parked outside. Wallace was the driver, and Rainey was in the back seat directly behind Wallace. Abdul-Karim testified that he heard Rainey say "let's go" to Riley and Everett before they jumped into the car. (*Id.* At 16–17.) Wallace then drove away.

In a search of the jewelry store after the robbery, police officers recovered a pair of handcuffs and a fired cartridge case of a Federal brand "wad-cutter" type bullet. Bullet casings of the same type and brand were found in Rainey's bedroom during a subsequent search. The search of Rainey's home also turned up a gold metal foil price tag matching those from the jewelry store. At trial, the Commonwealth presented testimony from an

employee of an adult bookstore who recalled that shortly before the date of the robbery, he sold Rainey handcuffs similar to those found in the jewelry store.

In June 1994, Riley turned himself in to the police and gave a statement to Detective Albert Maahs. In the statement, he confessed to killing Sun Kang during the robbery and inculpated Wallace and Everett. Riley did not mention Rainey in his written statement, instead asserting that Wallace stood outside the jewelry store door and acted as the getaway driver. Specifically, Riley's statement recounted that Wallace and Everett pulled up in Wallace's car and that Wallace told Riley to get into the car. Wallace then handed Riley a gun and informed him that they were going to rob a jewelry store. Wallace parked the car, and all three walked to the jewelry store where Wallace instructed Riley and Everett to go inside and closed the door behind them. Once inside the store, Everett told Riley to shoot Sun Kang, and Everett collected jewelry. When Riley and Everett saw Wallace's car pull up outside, they exited the store and got into the car; Wallace then drove away. Riley's statement also identified Wallace as the mastermind of the robbery.

After additional investigation, the police obtained a search warrant for Rainey's home and an arrest warrant for Rainey. Rainey fled from the police on more than one occasion before they managed to arrest him. Following his arrest, Rainey was charged with, among other things, first degree murder. Before trial, Rainey's counsel filed a motion to suppress and a motion to sever his trial from that of his co-defendants. The Court of Common Pleas denied both motions, and Rainey was tried with Riley and Wallace.

At trial, Detective Maahs was called to testify regarding Riley's statement. Maahs testified that the written statement was taken in the presence of Riley's child advocate, Matthew Blum. Maahs also recounted the contents of Riley's written statement, which had been redacted to avoid incriminating Riley's codefendants.

Riley testified in his own defense. His testimony at trial contradicted portions of his written statement as well as other prior statements that he made to Maahs. In particular, Riley testified that he was forced to commit the robbery by Everett. On the witness stand, Riley explained that he owed money to Everett, who threatened to hurt him unless he participated in the robbery. In his earlier conversation with Maahs, Riley stated that he had been threatened by Wallace, not by Everett. When asked about this inconsistency at trial, Riley responded that he had initially placed the blame on Wallace because he had been afraid of Everett. Riley also testified that Rainey was not involved in the robbery and that he had not mentioned Rainey's name to Maahs.

To impeach Riley, Wallace's counsel recalled Maahs. Maahs testified that after Riley finished giving his written statement and some time elapsed, Maahs spoke with him a second time. Riley's mother was present during this conversation. According to Maahs, Riley acknowledged that a fourth person—Rainey—had been involved in the robbery. Maahs recalled that Riley said that he was afraid of Rainey. During this conversation, Riley clarified that some of the actions that he had attributed to Wallace in his statement were actually done by Rainey, who "ran the show." (J.A. at 61.) In particular, Riley said that Rainey planned the robbery, recruited Riley to participate, handed Riley the gun, gave Everett the

handcuffs, closed the door of the store behind Riley and Everett, sold the jewelry after the robbery, and divided the proceeds. Moreover, Riley stated that he had accompanied Rainey to purchase the handcuffs used in the robbery and identified the store where they made the purchase. According to Maahs's testimony, Riley stated that Rainey had threatened him and that he would not put anything about Rainey in writing.

On May 22, 1995, after a seven-day trial, the jury found Rainey guilty of first degree murder, two counts of robbery, aggravated assault, recklessly endangering another person, conspiracy to commit robbery and/or murder, possessing an instrument of crime, and carrying a firearm in public. Pursuant to the jury charge and the verdict slip, the jury, having found Rainey guilty of first degree murder, did not enter a verdict with respect to second or third degree murder. At the sentencing stage, the jury deadlocked on whether to impose the death penalty for the first degree murder conviction. On May 24, 1995, the trial court imposed the mandatory term of life imprisonment for the murder conviction and deferred sentencing on the remaining convictions. Rainey's counsel filed a motion for a new trial based on the denial of the motion to sever, which was denied. Thereafter, the court formally imposed a life sentence for the first degree murder conviction and a consecutive term of six to twelve years for the remaining convictions.

Represented by new counsel, Rainey appealed to the Pennsylvania Superior Court. Appellate counsel raised six claims but did not argue that trial counsel was ineffective or that the evidence of Rainey's shared intent to kill was insufficient to sustain his conviction for first degree

murder.[1] The Superior Court rejected all of Rainey's claims and affirmed the judgment of sentence. The Pennsylvania Supreme Court denied allowance of appeal.

In October 1998, Rainey filed a pro se petition under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541–9546. The state court appointed counsel to represent Rainey in the PCRA proceedings. Counsel, however, filed a letter pursuant to *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. Ct. 1988) (*en banc*), claiming that Rainey's PCRA petition raised no meritorious claims (a "*Finley* letter"). Counsel was permitted to withdraw, and Rainey proceeded pro se. Rainey argued that his trial and appellate counsel were ineffective for failing to challenge his first degree murder conviction on the ground that the evidence was insufficient to prove his shared intent to kill (the "layered ineffectiveness claim").[2] The PCRA

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1 In ruling on one of Rainey's claims—that the trial court erred in allowing Maahs to testify as to Riley's statement implicating Rainey—the Superior Court evaluated the totality of the evidence presented at trial. It held that "[t]he uncontradicted evidence of guilt at trial was so overwhelming and the prejudicial effect, if any, of [Maahs's] testimony was so insignificant by comparison, that it is clear beyond a reasonable doubt that the error did not contribute to the verdict." (J.A. at 340.) The Superior Court, however, was not presented with and did not rule on the specific argument that the evidence of Rainey's shared intent to kill was insufficient.

2 In presenting this argument, Rainey used the term "weight of the evidence" rather than "sufficiency of the evidence." As we discuss more thoroughly below, given that Rainey's pro se petition must be construed liberally, Rainey merely mislabeled his claim and fairly presented the sufficiency issue to the state courts.

court concluded that Rainey's claims lacked merit and dismissed his petition. Rainey appealed pro se to the Superior Court, which affirmed the denial of relief. The Superior Court held that Rainey's layered ineffectiveness claim lacked merit and that his other claims had been waived.

Rainey timely filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the Eastern District of Pennsylvania. Rainey advanced six claims for relief, including the layered ineffectiveness claim. The case was referred to a Magistrate Judge, who issued a Report and Recommendation concluding that Rainey was entitled to habeas relief based on his layered ineffectiveness claim. Specifically, the Magistrate Judge concluded that (1) the evidence at trial was insufficient to establish a shared intent to kill, (2) Rainey's trial and appellate counsel rendered deficient performance in failing to raise the sufficiency claim, and (3) this deficient performance prejudiced Rainey. With respect to prejudice, the Magistrate Judge reasoned as follows:

> In light of the lack of evidence of specific intent in the instant case, [I] believe that there is a reasonable possibility that the trial court would have granted a new trial if counsel had argued that the verdict of first degree murder was against the weight of the evidence. As a result, [I] find that Rainey[] was prejudiced by trial counsel's deficient performance. . . . Moreover, [I] believe that if direct appellate counsel had raised and fully briefed the [sufficiency of the evidence issue], then there is a reasonable possibility that the result of Rainey's appeal would have been different.

(J.A. at 31–33.) The Magistrate Judge recommended that Rainey's other claims be dismissed as procedurally defaulted.

The District Court appointed counsel to represent Rainey and held oral argument. By Memorandum and Order dated February 21, 2008, the District Court approved and adopted the Report and Recommendation in part, rejected it in part, denied the petition, and declined to issue a certificate of appealability. Specifically, the District Court held that Rainey had properly exhausted his layered ineffectiveness claim, that there was insufficient evidence of Rainey's shared intent to kill, and that his counsel rendered deficient performance in failing to challenge the sufficiency of the evidence at trial or on direct appeal. With respect to prejudice, however, the District Court concluded that:

> [Rainey] suffered no prejudice. . . . Although the evidence may not have been sufficient to sustain a first degree murder verdict, it was sufficient for a second degree felony murder conviction. . . . He was sentenced to life on the first degree murder conviction, the same sentence he would have received had he been convicted of second degree murder.

(J.A. at 52–53.) Accordingly, the District Court held that Rainey was not entitled to habeas relief on the ground of ineffective assistance of counsel. The District Court adopted the recommendation that Rainey's other claims be dismissed as procedurally defaulted and denied the habeas petition.

Rainey timely filed a Notice of Appeal. On April 17, 2008, he filed a pro se motion for a certificate of appealability. We granted the

certificate only as to the "layered ineffectiveness of counsel claim." (*Id.* at 55.) We permitted Rainey's counsel to withdraw and appointed present pro bono counsel.

II.

The District Court exercised jurisdiction over Rainey's petition for a writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254. We have jurisdiction to review the District Court's denial of the writ pursuant to 28 U.S.C. §§ 1291 and 2253.

When reviewing a district court decision regarding a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, "[w]e apply the same standards as the District Court, as mandated by the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA')." *Jacobs v. Horn*, 395 F.3d 92, 99 (3d Cir. 2005). Section 2254(d) provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Moreover, "[a] federal habeas court must presume that a state court's findings of fact are correct. The petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence." *Jacobs*, 395 F.3d at 99 (citing 28 U.S.C § 2254(e)(1)).

Under § 2254(d)(1), a state court decision is contrary to Supreme Court precedent if the state court reached a "'conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.'" *Marshall v. Hendricks*, 307 F.3d 36, 51 (3d Cir. 2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). A state court decision is an unreasonable application of Supreme Court precedent if the court: (1) "identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular case"; (2) "unreasonably extends a legal principle from the Supreme Court's precedent to a new context where it should not apply"; or (3) "unreasonably refuses to extend that principle to a new context where it should apply." *Gattis v. Snyder*, 278 F.3d 222, 228 (3d Cir. 2002) (citing *Williams*, 529 U.S. at 407). "The unreasonable application test is an objective one—a federal court may not grant habeas relief merely because it concludes that the state court applied federal law erroneously or incorrectly." *Jacobs*, 395 F.3d at 100 (citations omitted).

Ineffective assistance of counsel claims are "governed by the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)." *Shelton v. Carroll*, 464 F.3d 423, 438 (3d Cir. 2006) (citing *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)). For AEDPA purposes, the *Strickland* test qualifies as "clearly established Federal law, as determined

by the Supreme Court." *Williams*, 529 U.S. at 391. Under *Strickland*, a habeas petitioner must demonstrate that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's error, the result would have been different. 466 U.S. at 687. For the deficient performance prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. This review is deferential:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

Id. at 689.

Not every "error by counsel, even if professionally unreasonable, . . . warrant[s] setting aside the judgment of a criminal proceeding." *Id.* at 691. "Even if a defendant shows that particular errors of counsel were unreasonable, . . . the defendant must show that they actually had an adverse effect on the defense"; in other words, the habeas petitioner must show that he was prejudiced by counsel's deficient performance. *Id.* at 693. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In assessing an ineffective assistance of counsel claim, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding . . . . In every case the court should be concerned with whether . . . the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.* at 696.

III.

A. Exhaustion of the Layered Ineffectiveness Claim

We first address the Commonwealth's argument that Rainey failed to exhaust his layered ineffectiveness claim, in which Rainey contends that his trial and appellate counsel were ineffective for failing to challenge the *sufficiency* of the evidence establishing a shared intent to kill. The Commonwealth asserts that before the state courts, Rainey contended that his counsel should have challenged the *weight* of the evidence but did not make a *sufficiency* argument. Following a review of Rainey's filings and the decisions of the PCRA courts, the District Court held that "the Pennsylvania court was presented with and did consider Rainey's ineffectiveness claim as implicating the sufficiency of the evidence." (J.A. at 46.)

Pursuant to 28 U.S.C. § 2254(b)(1)(A), the federal courts may grant a state prisoner's habeas petition only if the petitioner "has exhausted the remedies available in the courts of the State." AEDPA's exhaustion requirement mandates that the claim "must have been 'fairly presented' to the

state courts." *Bronshtein v. Horn*, 404 F.3d 700, 725 (3d Cir. 2005) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)). Fair presentation "means that a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *Id.* at 725 (internal quotation marks & citations omitted). In other words, the petitioner must afford the state system "the opportunity to resolve the federal constitutional issues before he goes to the federal court for habeas relief." *Zicarelli v. Gray*, 543 F.2d 466, 472 (3d Cir. 1976) (*en banc*) (internal quotation marks & citations omitted). Fair presentation by the petitioner to the state courts is sufficient; the claims "need not have been considered or discussed by those courts." *Swanger v. Zimmerman*, 750 F.2d 291, 295 (3d Cir. 1984) (citations omitted).

To assess whether a pro se petitioner fairly presented claims to the state courts, we will construe the pleadings liberally. *Cf. United States v. Otero*, 502 F.3d 331, 334 (3d Cir. 2007) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). A habeas corpus petition prepared by a prisoner without legal assistance may not be skillfully drawn and should thus be read generously. "It is the policy of the courts to give a liberal construction to pro se habeas petitions." *United States ex rel. Montgomery v. Brierley*, 414 F.2d 552, 555 (3d Cir. 1969) (citation omitted).

The Commonwealth correctly asserts that a challenge to the sufficiency of the evidence differs significantly from a challenge to the weight of the evidence. Under Pennsylvania law, the "distinction between a determination of the weight of the evidence, which allows the trial court to make an independent assessment of the credibility of the

prosecution's case, and a sufficiency determination, which confines the reviewing tribunal to accepting the evidence produced by the prosecution in the most favorable light, is well established." *Commonwealth v. Vogel*, 461 A.2d 604, 609 (Pa. 1983) (internal citations omitted).

In *Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000), the Supreme Court of Pennsylvania clarified the differences between the two claims in some detail. The court described a sufficiency claim in the following terms:

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Id. (internal citations omitted). A weight claim, as the court explained, differs from a sufficiency claim:

> A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain

> the verdict. Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. . . . [T]he role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.

Id. at 751–52 (internal quotation marks, footnote, and citations omitted).

Given the significant differences between sufficiency and weight claims, in order for Rainey to have exhausted his sufficiency claim, he must have fairly presented that claim to the Pennsylvania courts. Presentation of a weight claim would not exhaust a sufficiency claim. Nevertheless, as Rainey was pro se, his filings are to be read liberally. In his initial pro se Motion for Post Conviction Collateral Relief, Rainey alleged that the "[w]eight of the [e]vidence was [c]ontrary to the [v]erdict." (Commonwealth Supplemental Appendix ("Commw. S.A.") at 148.) Yet, he explained further that "[t]he evidence failed to establish that a shared specific intent to kill existed," a statement that sounds in sufficiency of the evidence rather than weight. (*Id.*) In his *Finley* letter, counsel appointed to represent Rainey characterized Rainey's argument as a weight claim. In stating the standard of review, however, counsel wrote as follows:

> In determining whether a verdict is against the weight of the evidence the court must view the evidence and all

> reasonable inferences from it in the light most favorable to the Commonwealth, as the verdict winner, and determine whether *sufficient* evidence was presented to prove each element of the crimes the defendant was convicted of beyond a reasonable doubt.

(*Id.* at 154) (emphasis added) (citations omitted). This standard is the correct standard for a *sufficiency* claim, not for a *weight* claim.

The PCRA court titled the section of its opinion addressing this claim "Weight of the Evidence." (*Id.* at 160.) In analyzing the claim, the court noted that "[o]n direct appeal, the defendant did not raise the issue of the sufficiency or weight of the evidence." (*Id.*) It determined, however, that the Superior Court analyzed the evidence of guilt and concluded that it was overwhelming. (*Id.*) As a result, the PCRA court was "thereby satisfied that the Superior Court had in fact viewed the evidence and found it to be *sufficient* to support the verdict." (*Id.* at 161) (emphasis added). While this analysis is cursory, it considers Rainey's claim as one challenging the sufficiency of the evidence.

In his pro se brief appealing the decision of the PCRA court, Rainey cited the standard of review for weight claims. The discussion that followed, however, while using the term "weight," actually contended that the evidence was not sufficient to demonstrate that Rainey had a shared intent to kill. Rainey argued that "the verdict was against the weight of the evidence in that it was not shown [he] had a shared intent to kill with the actual shooter." (J.A. at 356.) He likewise contended that "[a]n overview of the record instantly reveals that the Commonwealth failed to establish beyond a reasonable doubt that a shared

specific intent to kill existed." (*Id.* at 361.) Whether the Commonwealth has shown or established the existence of an element of a crime is an inquiry into the sufficiency of the evidence, not its weight. Furthermore, Rainey cited *Commonwealth v. Bachert*, 453 A.2d 931, 933 (Pa. 1982), a case that lays out the test for sufficiency of the evidence. Later in the argument, however, Rainey delineated the standard of review for weight claims. (J.A. at 361) ("[T]he evidence need not be viewed in a light most favorable to the verdict winner, and [the court] may evaluate the credibility of witnesses by itself.").

For a claim to be exhausted, the critical requirement is fair presentation *by the petitioner*; the claim "need not have been considered or discussed by [the state] courts." *Swanger*, 750 F.2d at 295 (citations omitted). Accordingly, we base our conclusion regarding exhaustion on what Rainey presented in his filings, not on the way in which those filings were interpreted by the state courts. Given that pro se petitions are to be construed liberally, Rainey's filings, while internally inconsistent, can fairly be read as asserting a claim that his trial and appellate counsel were ineffective for failing to challenge the sufficiency of the evidence.[3] In sum, we affirm the District Court's conclusion that Rainey's PCRA filings fairly presented the claim that his trial and appellate counsel were ineffective for failing to litigate *sufficiency* of the evidence. Rainey thus exhausted

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[3] The Commonwealth responds that Rainey must have been making a weight argument as he faulted both trial and appellate counsel and only weight claims must be raised at trial whereas sufficiency claims can be raised for the first time on appeal. This argument is unpersuasive as it presumes that a pro se litigant has an understanding of the intricacies of Pennsylvania criminal procedure.

this claim before the state courts, and it is appropriately before us on federal habeas review.

B. Ineffective Assistance of Counsel

Having concluded that Rainey exhausted his layered ineffectiveness claim, we next address whether the state courts' denial of this claim "was contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). As previously stated, a claim of ineffective assistance of counsel is assessed under the familiar two-prong *Strickland* test. With respect to the sequence of the two prongs, the *Strickland* Court held that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." 466 U.S. at 697. We believe this to be the case here.

Accordingly, we turn first to the issue of whether Rainey was prejudiced by his trial and appellate counsel's failure to challenge the sufficiency of the evidence of his shared intent to kill. The District Court concluded that "where the defendant was not the killer and where the evidence of shared intent is lacking, counsel's failure to challenge a first degree murder conviction in a felony murder context is deficient." (J.A. at 51–52.) Nevertheless, the District Court held that Rainey failed to make out a claim for ineffective assistance of counsel under *Strickland* as "the

petitioner suffered no prejudice." (*Id.* at 52.) The District Court explained its reasoning as follows:

> There was sufficient evidence to sustain a second degree murder sentence which carries the same sentence—life imprisonment. Had counsel clearly raised a sufficiency of the evidence objection, it is unlikely that the PCRA court and the Superior Court would have vacated the petitioner's first degree murder conviction and granted a new trial because the result was not fundamentally unfair. Thus, the prejudice prong is not met, and the state court's decision was not unreasonable.

(*Id.*) Accordingly, the District Court held that Rainey "was sentenced to life on the first degree murder conviction, the same sentence he would have received had he been convicted of second degree murder. Thus, he suffered no prejudice as a consequence of any failure of counsel to raise the sufficiency issue . . . ." (*Id.* at 52–53) (citation omitted).

In *Clark v. Maggio*, 737 F.2d 471, 475 (5th Cir. 1984), the Fifth Circuit analyzed a fact pattern similar to that presented in the instant case. Under Louisiana law, if a murder occurs in the course of a robbery, it qualifies as first degree murder if the offender has a specific intent to kill or to inflict great bodily harm. *Id.* at 474–75. If such intent is lacking, the offense is instead second degree felony murder. *Id.* at 475. Reviewing the record, the court found no evidence that Clark possessed the intent required for first degree murder; thus, his conviction for that offense was unconstitutional. *Id.* Nevertheless, the court declined to grant Clark's habeas petition because there was no prejudice:

> Had the state court properly performed its function, it would have directed a verdict for Clark on the first degree murder charge and submitted to the jury only the second degree lesser-included offense [of felony murder]. There was no evidence that Clark actually shot Sawyer, but there was strong evidence that Clark participated in the robbery attempt and provided the means of escaping from the scene. This was sufficient for the jury to have found him to be a principal in the attempted robbery and thus guilty of second degree murder for any killing that resulted from the attempt. The sentence for that offense would have been the same as the one imposed on him. Because Clark has failed to show that he suffered any prejudice, we find no basis for granting a writ on the basis of insufficiency of the evidence.

Id. at 475–76 (footnotes omitted). In other words, the *Clark* court held that no prejudice occurs if a petitioner was wrongfully convicted of an offense for which there was insufficient evidence but is serving the same sentence that he would have been serving had he been properly convicted of the offense for which there was sufficient evidence. *Id.* at 476; *accord Brown v. Collins*, 937 F.2d 175, 182–83 (5th Cir. 1991) ("Brown's sentence for his conviction of aggravated battery . . . would have been the same [as the sentence he is currently serving], and therefore, he cannot demonstrate any constitutional prejudice . . . .").

The *Clark* case is directly applicable to the instant appeal.[4] Rainey was convicted of first degree murder, for which he is serving a life sentence. The jury also convicted Rainey of robbery. Assuming that the evidence presented at trial was insufficient to establish a shared intent to kill, it was nonetheless sufficient to establish the elements of second degree felony murder. Rainey was convicted of robbery, and the evidence clearly established that a death occurred during that robbery, which is sufficient to prove second degree murder under Pennsylvania law. *See* 18 Pa. Cons. Stat. Ann. § 2502(b) ("A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony."). Under Pennsylvania law, "[a] person who has been convicted of murder of the second degree shall be sentenced to a term of life imprisonment." 18 Pa. Cons. Stat. Ann. § 1102(b) (1995); *accord Castle v. Pennsylvania Bd. of Probation & Parole*, 554 A.2d 625, 627 (Pa. Commw. Ct. 1989) (holding that a conviction for second degree murder carries a *mandatory* life sentence under Pennsylvania law). Accordingly, had Rainey been retried and convicted of second degree murder, he would have received the same sentence.

According to Rainey, he was prejudiced because his trial and appellate counsel failed to

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[4] In *Clark*, which interpreted Louisiana law, the offense for which there was sufficient evidence—second degree felony murder—was a lesser included offense of the offense of conviction. Under Pennsylvania law, which governs the instant case, second degree felony murder is not a lesser included offense of first degree murder. This difference, however, is immaterial as the holding in *Clark* did not depend on the relationship between the two offenses but instead on a comparison between sentences.

challenge the sufficiency of the evidence establishing his shared intent to kill. Had trial or appellate counsel made such an argument and prevailed, Rainey would have been granted a new trial. At this new trial, double jeopardy would have prohibited Rainey from being tried for first degree murder but not for second or third degree murder. *See Burks v. United States*, 437 U.S. 1, 18 (1978); *Ball v. United States*, 163 U.S. 662, 669 (1896). Rainey has not identified any new argument or new evidence that he could have presented at a second trial such that he would not have been convicted of second degree murder.[5] Thus, we have no reason to speculate otherwise.

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[5] In arguing that he was prejudiced, Rainey relies heavily on *Everett v. Beard*, 290 F.3d 500 (3d Cir. 2000), *abrogated on other grounds as recognized in Priester v. Vaughn*, 382 F.3d 394 (3rd Cir. 2004). In *Everett*, as in the instant case, petitioner was convicted as an accomplice in a robbery, during which the other participants killed the proprietor of the store. *Id.* at 503. Everett was charged with and convicted of first degree murder and sentenced to life in prison. *Id.* At trial, "the state trial judge, in charging the jury, said over and over again that Everett could be found guilty of intentional [first degree] murder if his accomplice intended to cause the death of the victim." *Id.* Counsel failed to object to the jury charge, and Everett filed a habeas petition claiming ineffective assistance of trial counsel. The District Court denied Everett's petition. Everett appealed, and we reversed, concluding that counsel was ineffective for failing to object to the jury instructions. With respect to prejudice, we held that "but for the failure of counsel to object to the jury instructions, there is more than a reasonable probability that Everett would not have been convicted of first degree murder because there was no evidence that he possessed the requisite specific intent to kill." *Id.* at 515–16.

Rainey contends that *Everett* controls the outcome of the instant appeal; we disagree. In *Everett*, in holding that the petitioner was prejudiced by his first-degree murder

This analysis demonstrates that even had Rainey's counsel challenged the sufficiency of the evidence, Rainey would have received the same sentence that he is currently serving—life imprisonment. To establish prejudice, Rainey "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Here, the result of the proceeding—a life sentence—would have been the same had counsel challenged the sufficiency of the evidence. Accordingly, Rainey cannot show that he was prejudiced and cannot prevail on his claim of ineffective assistance of counsel. The District Court correctly concluded that Rainey did not suffer

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conviction, we did not address his sentence. Subsequent to our decision in *Everett*, the Supreme Court has reemphasized in a number of cases that prejudice under *Strickland* requires a showing of a reasonable probability of a different result, that is, a different sentence. *See, e.g.*, *Porter v. McCollum*, — U.S.—, 130 S. Ct. 447, 453 (2009) ("Porter must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence."); *Wong v. Belmontes*, — U.S. —, 130 S. Ct. 383, 386 (2009) ("[T]o establish prejudice, Belmontes must show a reasonable probability that the jury would have rejected a capital sentence . . . ."); *Wiggins v. Smith*, 539 U.S. 510, 536 (2003) ("We further find that had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence."). In light of these Supreme Court cases, we are squarely addressing the issue of whether Rainey would have received the same sentence even if his counsel had challenged the sufficiency of the evidence. Thus, the instant case is clearly distinguishable from *Everett*.

prejudice from counsel's failure to challenge the sufficiency of the evidence, and we affirm.

With respect to Rainey's remaining claims, the District Court concluded that they were procedurally defaulted. Because Rainey's layered ineffectiveness claim, the sole claim before us, fails on the prejudice prong, Rainey is not entitled to habeas relief.[6]

IV.

For the foregoing reasons, we will affirm the District Court's denial of Rainey's habeas petition.

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[6] Because we decline to grant Rainey's habeas petition, we need not address his contention that, were we to grant the writ, double jeopardy would bar his retrial for first, second, and third degree murder, making immediate release the only appropriate remedy.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KYLE RAINEY	:	**CIVIL ACTION**
	:	
v.	:	**No. 01-623**
	:	
BEN VARNER, *et al*	:	

MEMORANDUM AND ORDER

Savage, J. **February 21, 2008**

Kyle Rainey, a state prisoner serving a life sentence for first degree murder, has filed a petition for a writ of *habeas corpus* raising six claims alleging a variety of constitutional violations during his trial and the appellate process. Five claims are procedurally defaulted. The one exhausted claim, raising the ineffectiveness of trial and appellate counsel for failing to challenge the jury verdict as against the sufficiency of the evidence, does not warrant *habeas* relief because Rainey suffered no prejudice as the result of any failure of counsel. Therefore, the petition will be dismissed.

Factual and Procedural History

On June 1, 1994, Rainey and three accomplices robbed a jewelry store. During the robbery, co-defendant Nathan Riley shot and killed the shop owner, Sun Yoo Kang. On June 17, 1994, Riley surrendered to police and gave a written statement to Detective Albert Maahs in

which he admitted to taking part in the robbery and firing the fatal shot.

The shop owner's wife and another eyewitness later identified Rainey from a photo array as a participant in the crime. On the strength of the identifications, the police obtained a search warrant for Rainey's residence. Executing the search warrant, the police recovered merchandise taken from Kang's jewelry store and bullet casings which matched those used in the robbery. Rainey was eventually arrested along with accomplice Darrell Wallace.

On May 22, 1995, a jury convicted Rainey of first degree murder, robbery, aggravated assault, criminal conspiracy, recklessly endangering another person, possessing an instrument of crime, and carrying a firearm in public. The jury deadlocked on whether to impose a death sentence. Rainey was later sentenced to mandatory life in prison on the murder conviction and to a consecutive aggregate term of 6 - 12 years on the robbery and aggravated assault convictions. In his timely counseled direct appeal, Rainey raised six issues. The questions presented on direct appeal were:

1. His motion for severance was improperly denied;
2. The trial court erred in denying his motion to limit the examination of a testifying co-defendant regarding "prior bad acts";
3. The trial court improperly permitted a witness to testify to an

oral statement given by a co-defendant;

4. The trial court improperly permitted the prosecution to introduce into evidence a prior photographic identification during the re-direct examination of a witness;
5. The trial court improperly denied his request for funds to hire a handwriting examiner; and,
6. The prosecution routinely and improperly exercised peremptory strikes against prospective African-American jurors.

The Pennsylvania Superior Court, determining that the claims were meritless, affirmed the judgment of sentence on October 15,1997. The Pennsylvania Supreme Court denied *allocatur* on May 26, 1998. Thus, Rainey's conviction became final on August 24, 1998, at the conclusion of the time he had to seek discretionary review with the United States Supreme Court.

On October 21, 1998, Rainey filed a *pro se* Post Conviction Relief Act (PCRA) petition which was denied after his appointed counsel submitted a "*Finley* letter."[1] Rainey then appealed *pro se* to the Superior Court, raising three issues: (1) counsel for codefendant Wallace elicited perjured testimony from Commonwealth

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[1] A *Finley* letter, also known as a "no merit" letter, is a letter brief submitted 1 by counsel to the PCRA court explaining that there are no meritorious issues. *See Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. Ct. 1998).

witness Detective Maahs and the Commonwealth committed prosecutorial misconduct by not correcting the alleged false testimony; (2) the trial court's jury instructions on the issue of accomplice liability were erroneous; and (3) both trial and appellate counsel were ineffective for failing to raise, in post-verdict motions and on direct appeal, that the verdict was against the weight of the evidence. The Superior Court rejected the appeal on September 11, 2000, finding that the first two issues were waived because they had not been previously raised, and the third issue was meritless.

Rainey did not seek *allocatur* with the Pennsylvania Supreme Court.[2] Therefore, because the time to seek discretionary review with the United States Supreme Court started running when the Superior Court issued its decision, his PCRA became final on December 11, 2000.

The Petition for Writ of *Habeas Corpus*

Rainey's timely *pro se habeas* petition raises six claims that are similar to those

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[2] On May 9, 2000, the Pennsylvania Supreme Court issued an order declaring that a prisoner need not seek *allocatur* with the Pennsylvania Supreme Court for his claims to be deemed exhausted. PA. R. APP. P. 1114, *as amended by In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, Order No. 218 of Supreme Court Judicial Admin. Docket No. 1 (May 9, 2000) (per curiam). Therefore, the Pennsylvania Superior Court's opinion denying the petitioner's PCRA petition is the final decision of the Pennsylvania courts.

presented in the state court.[3] They are: (1) the trial court erred in denying a severance; (2) the trial court failed to limit the examination of a testifying co-defendant with respect to the co-defendant's "prior bad acts"; (3) the trial court improperly permitted a witness to testify to an oral statement given by a co-defendant without giving a limiting instruction; (4) the Commonwealth committed prosecutorial misconduct in failing to correct the perjured testimony of Detective Maahs; (5) the jury instruction regarding accomplice liability was improper; and, (6) trial and appellate counsel were ineffective for failing to raise the issue that the verdict was against the weight of the evidence. For the first time, in his third contention, he contends the trial court failed to give a limiting instruction after admitting the detective's testimony regarding the oral statement. His fourth, fifth and sixth points were not raised in his direct appeal. However, they had been presented in his PCRA petition and his appeal to the Superior Court from the denial of his first PCRA.

The *habeas* petition was referred to a magistrate judge for a report and

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[3] The petitioner's Antiterrorism and Effective Death Penalty Act (AEDPA) 3 clock started ticking on August 26, 1998. He filed his PCRA petition in state court on October 21, 1998, 61 days after the time started running, stopping the AEDPA clock. Time resumed running on December 11, 2000, when the time the petitioner had to seek review of the denial of his PCRA petition with the United States Supreme Court expired. At that point, petitioner had 304 days in which to file a timely *habeas* petition. Thus, the petition, filed on February 2, 2001, was within the permissible time.

recommendation. He recommended dismissing the first five claims as procedurally defaulted, and granting the writ and ordering a new trial on the ineffective assistance of counsel claim. After Rainey and the respondents filed objections to the Report and Recommendation, oral argument was heard.

The Commonwealth objects to the magistrate judge's recommendation that the writ be granted, arguing that he applied the wrong standard in analyzing the ineffective assistance of counsel claim. The Commonwealth also contends that Rainey's "second" ineffective assistance claim is a new claim that can not be raised now.

Exhaustion and Procedural Default

A federal court cannot grant a state prisoner *habeas* relief until he has exhausted his remedies in the state court, having given the state courts a "full and fair opportunity" to decide the issues first. *O'Sullivan v. Boerkel*, 526 U.S. 838, 842, 845 (1999); 28 U.S.C. § 2254(b)(1)(A). Exhaustion requires that a petitioner "fairly present" his federal claims at all state court levels so that the state court has an opportunity to rule on the factual and legal merits of the claims. *Cristin v. Brennan*, 281 F.3d 404, 410 (3d Cir. 2002). The state must be aware that it is being called on to address a federal claim. *McCandles v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999).

Procedurally defaulted claims are those that have never been raised in a collateral state court proceeding and are now procedurally barred by state law from being considered on

the merits in state court. *Villot v. Varner*, 373 F.3d 327, 334 (3d Cir. 2004). There is no question that if Rainey were to file a new PCRA petition, it would be untimely and his new claims would not be examined on their merits. Rainey concedes that the five claims identified by the magistrate judge as procedurally defaulted were not presented to the state court in a timely PCRA petition and were not preserved for federal review.[4] However, to overcome this impediment, he seeks to recharacterize his original claim that the trial court had improperly permitted a witness to testify to an oral statement given by a codefendant as an ineffective assistance of counsel claim premised on trial counsel's failure to object to the testimony or request a limiting instruction. *Id.* Acknowledging that this claim was not presented to the state court as an ineffective assistance of counsel claim, he argues that the claim had been fairly presented to the state court and may now be examined on its merits because the Superior Court ruled on the original claim in the context of trial counsel's failure to request a limiting instruction.

Raising a new claim at this late stage implicates AEDPA's one-year limitation period and exhaustion requirement.[5] Because the petitioner now frames the claim raised in the original petition as one based on ineffective assistance of counsel rather than trial court error, it may be considered only if it properly

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[4] Objections to the Report and Recommendation of United States Magistrate Judge (Document No. 28) at 2 ("Pet. Objections").

[5] Implicit in petitioner's argument is a motion to amend his original petition.

relates back to the filing date of the original petition to satisfy AEDPA's one-year limitation.

Rule 15 of the Federal Rules of Civil Procedure applies to *habeas* petitions. *Riley v. Taylor*, 62 F.3d 86, 89 (3d Cir. 1995). In the absence of undue delay, bad faith or dilatory motive, leave to amend under FED. R. CIV. P. 15(a) is freely given. *Forman v. Davis*, 371 U.S. 178, 182 (1962). Nevertheless, amendments in the *habeas* context must be examined in light of AEDPA's one-year limitations period. *United States v. Duffus*, 174 F.3d 333, 337 (3d Cir. 1999). Liberally granting leave to amend in *habeas* cases would frustrate Congressional intent to limit presentation of *habeas* claims to one year. *Id.* Therefore, although an amendment clarifying a federal *habeas* claim may be permitted, an amendment raising a completely new claim cannot be deemed timely under the relation back provision of Rule 15(c). *Id.*

Where an ineffective assistance of counsel claim arises out of the same facts as the original claim, the ineffective assistance of counsel claim relates back to the original claim and is timely under AEDPA. *Duffus*, 174 F.3d at 337 (quoting *U.S. v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999)). Rainey's newly characterized ineffective assistance of counsel claim arises out of the same set of facts as the originally asserted evidentiary claim.

Even though the new ineffective assistance of counsel claim relates back, it is still subject to AEDPA's exhaustion requirement. The onus is on the petitioner to demonstrate that he exhausted his claim.

Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997). Both the original claim and the newly characterized claim involve the same core facts – the admission, without objection or a limiting instruction, of the testimony of Detective Maahs regarding a co-defendant's oral statement implicating Rainey. However, the claim Rainey now presents is substantially different from the one he raised in the state court and in his *habeas* petition. The original claim challenged both the evidentiary ruling and the absence of a limiting instruction by the trial judge. It was a claim of trial court error. Now, Rainey seeks to assert counsel's ineffectiveness in failing to request the limiting instruction, an entirely new theory.

The claims are distinct. Exhaustion of one does not exhaust the other. *Willis v. Vaughn*, No. 01-1453, 2002 WL 31108917, at *3 (3d Cir. Sept. 19, 2000). Hence, because the claim that trial counsel was ineffective for failing to object to the admission of Detective Maahs' testimony or to request a limiting instruction had never been presented to the state court, it has not been exhausted and is procedurally defaulted.

All of Rainey's procedurally defaulted claims are barred unless he can demonstrate cause for the default and resulting actual prejudice, or that a fundamental miscarriage of justice will result if the claims are not considered. *Cristin*, 281 F.3d at 410-12. Demonstrating cause requires a showing that some objective factor, other than one attributable to the defense, prevented the petitioner from complying with state procedural

requirements. *Cristin*, 281 F.3d at 412.[6] To show cause, a petitioner must identify an impediment beyond his and his attorney's control which prevented compliance with the state's procedural rules. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Prejudice exists where there is a "reasonable probability" that the petitioner may not have been convicted. *Strickler v. Greene*, 527 U.S. 263, 289-90 (1999). The petitioner must show that he was deprived of "fundamental fairness" at trial as a result of the alleged 0violation of federal law. *Murray*, 477 U.S. at 494. "Actual prejudice" may result from alleged trial errors that "so infected the entire trial that the resulting conviction violated due process." *United States v. Frady*, 456 U.S. 152, 168-69 (1982).

Even if a petitioner cannot demonstrate cause and prejudice to overcome his procedural default, a defaulted claim may still be considered to avoid a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 748 (1991). To satisfy this exception, the petitioner must show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

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[6] A petitioner may also avoid procedural default if the Pennsylvania courts 6 would consider the merits of a claim despite the fact that a petitioner did not comply with the state's procedural requirements. *Hull v. Kyler*, 190 F.3d 88, 103 (3d Cir. 1999). However, because the state courts have given no indication that they would consider the merits of the petitioner's claims, the waiver argument is inapplicable here.

The fundamental miscarriage of justice threshold requires the prisoner to demonstrate factual innocence through the presentation of new evidence. *Keller v. Larkins*, 251 F.3d 408, 415-16 (3d Cir. 2001). He must show that the evidence could not have been discovered before the time for presenting it to the state court had expired. *Id.*

Whether a petitioner is actually innocent involves a factual inquiry into his guilt and the burden is on the petitioner to produce new evidence that would exonerate him. *Cristin*, 281 F.3d at 420, 422. The actual innocence standard requires a petitioner to persuade "the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 329 (1995).

The petitioner has offered no basis to excuse his procedurally defaulted claims. He has not attempted to explain or identify an objective factor, other than his counsel's failures, which prevented him from satisfying Pennsylvania's procedural requirements. Similarly, he has not proffered any new evidence that would absolve him of guilt, triggering the miscarriage of justice exception.

Where a petitioner fails to establish cause, a *habeas* court need not consider the prejudice requirement. *Engle v. Isaac*, 456 U.S. 107, 134 n. 43 (1982). Hence, because Rainey has not demonstrated cause for his failure to present five of his six claims properly in the state court, it is not necessary to address the prejudice component.

Applying these principles, I agree with the magistrate judge that five of Rainey's six claims are procedurally defaulted. Rainey's newly characterized ineffective assistance of counsel claim does not relate back to the filing of the original *habeas* petition; and, even if it did, the claim is unexhausted and procedurally defaulted.

Ineffective Assistance of Counsel Claim

Rainey's remaining claim involves the important distinction between the sufficiency and the weight of the evidence, and the difference between first degree and second degree murder in Pennsylvania.

Rainey claims his trial and appellate counsel were ineffective for failing to challenge the sufficiency of the evidence to support his first degree murder conviction. The Commonwealth argues that because he never posed the underlying question as one of sufficiency, but rather weight, he is precluded from doing so now.

The distinction is critical. A sufficiency of the evidence claim is a cognizable federal constitutional claim. *Jackson v. Virginia*, 443 U.S. 307 (1979).[7] A weight of the evidence claim,

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[7] The test on habeas review when the petitioner claims his conviction rests on insufficient evidence was formulated by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). The court reiterated the principle that due process requires that a person can be convicted only if every element of the crime has been established beyond a reasonable doubt; and where a prisoner challenges the sufficiency of the evidence to support his

on the other hand, is not. *Tibbs v. Florida*, 457 U.S. 31 (1982).

Even if Rainey's use of the word "weight" rather than "sufficiency" can be explained by his *pro se* status at the time, he must still overcome the exhaustion threshold. A *habeas* court cannot review an issue the state court did not have the opportunity to consider. Thus, if the state court, despite the words it used, considered the ineffectiveness issue in the context of sufficiency rather than weight or had the opportunity to do so, Rainey's claim would be cognizable on *habeas* review.

In his form Motion for Post Conviction Collateral Relief, Rainey specified that he was raising, among other issues, his trial counsel's ineffectiveness and "the weight of the evidence." Clarifying his contention in the portion calling for the factual bases of his claims, he made clear he was challenging the sufficiency of the evidence of shared intent. He wrote, "The evidence failed to establish that a shared specific intent to kill existed."[8] This contention goes to sufficiency and not weight. Despite what he meant and stated, Rainey mislabeled the underlying issue as the weight, not the sufficiency, of the evidence.

Rainey did the same in his brief to the Superior Court where he explicitly framed the issue in sufficiency terms. He contended that his attorneys were ineffective for failing to raise the issue that the evidence was insufficient to make

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state conviction, he states a federal constitutional claim. *Id.* at 321-22.

[8] PCRA Mot. p. 3.

out the elements of first degree murder, specifically the specific intent element.

Rainey did not literally characterize his claim as counsel's failure to challenge the sufficiency of the evidence of shared intent in the state court, instead casting it as the "weight of the evidence." When the Superior Court considered the ineffectiveness argument, it conflated weight and sufficiency. It characterized Rainey's argument as counsel's failure "to challenge the weight of the evidence since the Commonwealth failed to prove beyond a reasonable doubt that Rainey shared a specific intent to kill with the codefendant who fired the fatal shot." This characterization sounds a sufficiency tone. A failure to prove an element of a crime beyond a reasonable doubt goes to sufficiency, not weight. Thus, the Pennsylvania court was presented with and did consider Rainey's ineffectiveness claim as implicating the sufficiency of the evidence.

Indeed, the PCRA court later interpreted the Superior Court's ruling as one based on the sufficiency of the evidence. It noted that the appellate court had found the evidence "sufficient to support the verdict." *Commonwealth v. Rainey*, C. P. No. 9407-0834, op. at 3 (Nov. 2, 1999).

Rainey's attorneys did not raise either the weight or the sufficiency of the evidence. Nevertheless, the Superior Court did consider it in the context of the ineffectiveness claim, a federal constitutional claim, and then determined it was harmless error. Though it did not expressly so state, the state court appeared to decide the claim as a federal one or, at least,

considered it as interwoven with one. Thus, the claim has been exhausted.

Turning to the merits of Rainey's claim as he intended it and as it appears the Pennsylvania Superior Court considered it, I examine whether trial and appellate counsel were ineffective for failing to argue that the evidence was insufficient to sustain the conviction for first degree murder. Specifically, Rainey argues that his attorneys were deficient because they failed to raise the issue that the Commonwealth had not proven beyond a reasonable doubt that he had shared the specific intent to kill.

Because Rainey was not the shooter, he could have been convicted of first degree murder only if he had shared the specific intent to kill the victim with his co-defendant who fired the fatal shot. *See* 18 Pa.C.S. §§ 2501; 2502 (a, d); *Commonwealth v. Huffman*, 638 A.2d 961, 962 (1994); *Commonwealth v. Bachert*, 453 A.2d 931, 935 (1982). Evidence that the fruits of the robbery and bullet casings matching the gun the co-defendant used to kill the victim were found in Rainey's home, although corroborative of the eyewitnesses' testimony that Rainey had participated in the robbery, did not supply sufficient evidence of shared intent. The evidence offered by the Commonwealth to support its shared intent theory was supplied by Detective Maahs who testified that co-defendant Riley had told him that Rainey had organized the robbery and had provided the gun. Rainey's role in the robbery as established by Maahs'

hearsay testimony still did not provide sufficient evidence of a specific intent to kill the victim.[9]

The Superior Court, on two occasions, emphasized the overwhelming "uncontradicted evidence of guilt," without specifically referring to first degree murder, and concluded that counsel "cannot be considered ineffective for failing to raise a meritless claim." *Commonwealth v. Rainey*, 704 A.2d 1121 (Table), No. 3871 PHL 1995, slip op. at 8 (Pa. Super. Oct. 15, 1997) (unpublished opinion) (*Rainey I*); *Commonwealth v. Rainey*, 766 A.2d 891 (Table), No. 2362 EDA 1999, slip op. at 6 (Pa. Super. Sept. 11, 2000) (unpublished opinion) (*Rainey II*). In affirming the denial of Rainey's PCRA petition in which he raised counsel's ineffectiveness, the Superior Court stated:

> On direct appeal from the judgment of sentence, this Court stated that there was overwhelming evidence of guilt. The evidence included the testimony of two eyewitnesses who testified that they saw [the petitioner] and the codefendants commit the crime [robbery], and the police found store merchandise and matching bullet casings in [Rainey's] home. Therefore, we find

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[9] The Superior Court, as the Commonwealth no 9 w and then argued, found that Maahs' testimony was harmless because it had been impeachment and not substantive evidence. Yet, the state court used the same testimony as substantive evidence of petitioner's shared intent.

> that the verdict was not against the weight of the evidence, and counsel cannot be considered ineffective for failing to raise a meritless claim.

Rainey II at 6 (citing *Rainey I* at 8).

None of the cited evidence establishes shared intent. It does support a finding of Rainey's participation in a robbery that ended in a murder. In other words, it was sufficient evidence of guilt of second degree felony murder, but not of first degree murder.

Under AEDPA, the state court's decision must stand unless (1) it was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) it was based on an unreasonable determination of facts in light of the evidence presented in the state court. *Lam v. Kelchner*, 304 F.3d 256, 263 (3d Cir. 2002); 28 U.S.C. § 2254(d)(2). For purposes of this analysis, the state court's factual determinations are presumed to be correct and can only be rebutted by clear and convincing evidence. 28 U.S.C.§ 2254(e)(1).

Under the "unreasonable application" prong of §2254(d)(1), "[a] federal habeas court may not issue the writ simply because it concludes in its independent judgment that the state court applied clearly established law incorrectly." *Albrecht v. Horn*, 485 Fed.3d 103, 116 (3d Cir. 2007). Instead, the state court's application must be unreasonable as well as incorrect. *Williams v. Taylor*, 529 U.S. 362, 411 (2000).

The state court applied the correct legal standard for assessing counsel's effectiveness as established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). However, it misapplied the sufficiency of the evidence standard. As a result, the analysis of the effectiveness claim was skewed. The state court's determination that there was overwhelming evidence of guilt of first degree murder, upon which it premised its finding that counsel's failure to argue a lack of sufficiency of evidence was harmless, was wrong in light of Pennsylvania's own law on shared intent and the Supreme Court's holding in *Jackson v. Virginia*.

The state court's reasoning may have been flawed, but the result was not. Had the sufficiency evaluation been performed properly, counsel's effectiveness would have been found deficient. However, there still would not have been any prejudice as a result of the deficiency.

Ineffective assistance of counsel claims are evaluated under the familiar two part standard established in *Strickland*. See *Williams v. Taylor*, 529 U.S. 362, 391 (2000). First, the petitioner must demonstrate that his attorney's performance was deficient, that is, "counsel's representation fell below an objective standard of reasonableness," considering all of the surrounding circumstances of the particular case and the facts viewed at the time of counsel's conduct. *Strickland*, 466 U.S. at 687-89. Second, he must show that the deficiency prejudiced his defense. *Id.* at 692. The prejudice prong requires a showing that as a result of the deficient representation, a reasonable probability exists that the result of the

proceedings would have been different. *Id.* at 694. A reasonable probability is one that is "sufficient to undermine confidence in the outcome." *Id.* at 694. In other words, the prejudice component focuses on whether counsel's deficient performance renders the result of the proceedings unreliable or fundamentally unfair. *Williams*, 529 U.S. at 393, n.17.

The *Strickland* test for evaluating an ineffectiveness of counsel claim is clearly established federal law determined by the Supreme Court. *Jacobs v. Horn*, 395 F.3d 92 (3d Cir. 2005). Consequently, a state court evaluating an ineffective assistance of counsel claim must use the *Strickland* test. The Pennsylvania courts in Rainey's case did apply the *Strickland* analysis. Therefore, because the "contrary to" clause of the AEDPA *habeas* standard does not afford a ground for *habeas* relief, the state court's decision can be set aside only if it was based on an objectively unreasonable determination of the facts in light of the evidence.

When the state court correctly identifies the appropriate federal law but applies it unreasonably to the facts of the particular case, a petitioner is entitled to *habeas* relief. *Thomas v. Varner*, 428 F. 3d 491, 497 (3d Cir. 2005). Incorrect application of federal law is insufficient. Rather, it is an objectively unreasonable application of the facts that is the test. *Id.* The question then is whether the Pennsylvania court unreasonably applied the *Strickland* standard to the facts of Rainey's case. Answering this question requires an analysis of the ineffectiveness claim.

The Deficiency Prong

A reasonably competent attorney must know the state's controlling law. Accordingly, his performance is viewed in light of that law.

Pennsylvania law on shared specific intent as an essential element of first degree murder was well established at the time of Rainey's conviction and subsequent appeal. *Commonwealth v. Huffman*, 638 A.2d 961, 962 (Pa. 1994); *Commonwealth v. Bachert*, 453 A.2d 931, 935 (Pa. 1982). Competent counsel would have known that the prosecution's evidence was insufficient to sustain a first degree murder conviction. Yet, neither trial counsel nor appellate counsel raised the sufficiency issue.

There is a strong presumption that counsel's performance fell within the broad range of responsible professional representation. In other words, unless the petitioner proves otherwise, it is presumed that what counsel did or did not do was part of sound trial strategy. *Strickland*, 466 U.S. at 690; *Thomas*, 428 F.3d at 499. A petitioner may overcome the presumption by showing either that the proffered strategy was not the motivating factor, or that the conduct could not have been part of a sound strategy. *Thomas*, 428 F.3d at 499. Where the reason for the conduct is unexplained, the petitioner must demonstrate that no acceptable strategy suggested by the prosecution could have supported the conduct. *Id.* at 500.

There is no strategic reason to explain defense counsel's failure to challenge the sufficiency of the evidence. Where a defendant did not fire the fatal shot, he had to have shared

the specific intent to kill the victim with the shooter to sustain a first degree murder conviction. Accordingly, where the defendant was not the killer and where the evidence of shared intent is lacking , counsel's failure to challenge a first degree murder conviction in a felony murder context is deficient.[10]

Where counsel's deficiency has been demonstrated, the question is: did counsel's failure to raise a challenge that the verdict was against the sufficiency of the evidence prejudice Rainey.

The burden is on the petitioner to establish that counsel's performance prejudiced him. *Marshall*, 307 F.3d at 89 (citing *Strickland*, 466 U.S. at 687). Prejudice requires a showing that "the result of the proceeding would have been different" had counsel performed competently. *Strickland*, 466 U.S. at 694.

The magistrate judge's conclusion that the intent to kill could not be inferred from the evidence presented at trial is correct. However, contrary to the magistrate judge's finding, the petitioner suffered no prejudice. There was sufficient evidence to sustain a second degree murder conviction which carries the same sentence - life imprisonment. Had counsel clearly raised a sufficiency of the evidence objection, it is unlikely that the PCRA court and the Superior Court would have vacated the

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[10] In *Strickland*, the Supreme Court stated that a court may approach the ineffectiveness inquiry in any order if the petitioner makes an insufficient showing on one of the two prongs. 466 U.S. 697.

petitioner's first degree murder conviction and granted a new trial because the result was not fundamentally unfair. Thus, the prejudice prong is not met, and the state court's decision was not unreasonable.

Harmless Error

Rainey was prejudiced to the extent that he was improperly convicted of first degree murder. He was not prejudiced with respect to his term of imprisonment. Thus, if there were any constitutional error, it was harmless.

The jury clearly found that Rainey was guilty of robbery and the murder was committed in the course of that robbery. Although the evidence may not have been sufficient to sustain a first degree murder verdict, it was sufficient for a second degree felony murder conviction. Had Rainey been sentenced to death on the first degree murder conviction, the error would not have been harmless. He was sentenced to life on the first degree murder conviction, the same sentence he would have received had he been convicted of second degree murder. Thus, he suffered no prejudice as a consequence of any failure of counsel to raise the sufficiency issue; and, even if there had been any constitutional error, there was no substantial and injurious effect as a result. See, *Fry v. Pliler*, ____U.S. ____; 127 S.Ct. 2321 (2007).

Conclusion

Rainey's detention is not unlawful because there was ample evidence to sustain a conviction for second degree murder which carries the same penalty as the first degree murder conviction. His detention is not affected by any failure of counsel. Therefore, the petition for habeas relief will be denied.

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT FO PENNSYVLANIA

KKYLE RAINEY	:	**CIVIL ACTION**
V.	:	
BEN VARNER, et al.	:	**No. 01-623**

REPORT AND RECOMMENDATION

PETER B. SCUDERI
UNITED STATES
MAGISTRATE JUDGE

June 19, 2002

Before the court is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by Kyle Rainey ("Rainey"), an individual currently incarcerated in the Dallas State Correctional Institution. For the reasons that follow, I recommend that the petition be granted.

FACTS AND PROCEDURAL HISTORY:

The state court has summarized the facts underlying this case as follows:

> On June 1, 1994, [Rainey] and three [3] co-conspirators robbed a jewelry store. During the commission of the robbery, the gunman, Nathan Riley (Riley), shot and killed storeowner Sun Yoo Kang in front of his wife, Mahlee Kang. Officers of the Philadelphia Police Department interviewed Mrs. Kang and Al-Asim M. Abdul-Kareim, a witness who was

present outside the store in a parked automobile. Both individuals provided information regarding the identity of two [2] males who had entered the store, another male who remained in a car parked in front of the store, and a fourth male who closed the store door after the two [2] males entered the store.

On June 17, 1994, Riley surrendered to the police and gave a statement, which was reduced to writing by the interviewing detective, Albert Maahs. Riley signed the statement. In his statement, Riley admitted that he had taken part in the robbery and had fired the shot that fatally wounded Mr. Kang.

On June 26, 1994, Mrs. Kang and Mr. Abdul-Karim positively identified [Rainey] from a photo array as a participant in the events of June 1, 1994. Two [2] days later, after obtaining a search warrant, the police searched [Rainey's] home and found a .38 caliber weapon with bullet casings matching those bullets used in the robbery. Police also discovered a small gold-colored price tag which Mrs. Kang identified as a tag from her store with her handwriting on it. The police also searched the house of Sharon Bell, the girlfriend of Darrell Wallace (Wallace), another accomplice to the crimes. Inside the house, the police found the same type of jewelry that Mrs. Kang described as stolen from the store.

Commonwealth v. Rainey, No. 3871 Phila. 1995, at 2-3 (Pa. Super. Oct. 15, 1997).

Rainey was subsequently arrested and charged with an array of crimes stemming from the events on June 1, 1994. Prior to trial, Rainey moved to sever his trial from his co-defendants on the basis of antagonistic defenses. The trial court denied his motion.

On May 22, 1995, following a jury trial before the Honorable John J. Poserina, Court of Common Pleas of Philadelphia County, Rainey was found guilty of murder in the first degree, two (2) counts of robbery, aggravated assault, recklessly endangering another person, conspiracy, possessing an instrument of crime, and carrying a firearm on public streets. After the jury announced during the penalty phase hearing that it was deadlocked on whether to sentence Rainey to dea5th or to a term of life imprisonment, Judge Poserina imposed a life sentence.[1] Post-verdict motions were filed and denied. On October 17, 1995, Judge Poserina formally reimposed a life sentence for the murder charge and also sentenced Rainey to a consecutive, aggregate term of 72 to 144 months of imprisonment for the remaining convictions.

Rainey filed a direct appeal in the Pennsylvania Superior Court claiming:

> (1) his motion to sever was improperly denied;

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[1] Pursuant to Pennsylvania law, "[a] person who has been convicted of a murder of the first degree shall be sentenced to death or to a term of life imprisonment." 18 Pa. Cons. Stat. Ann § 1102 (West 1994).

(2) the trial court erred in denying his motion to limit the examination of a testifying co-defendant with respect to "prior bad acts;"

(3) the trial court improperly permitted a witness to testify to an oral statement given by a co-defendant;

(4) the trial court improperly permitted the prosecution to introduce into evidence a prior photographic identification during the re-direct examination of a witness;

(5) the trial court improperly denied his request for funds to hire a handwriting examiner; and

(6) the prosecution routinely and improperly exercised peremptory strikes against prospective jurors of an African American background.

The Superior court determined that Rainey's claims were meritless and affirmed the judgment of sentence on October 15, 1997. Commonwealth v. Rainey, 704 A.2d 1121 (Pa. Super. 1997) (table); No. 3871 Phila. 1995 (Pa. Super. Oct. 15, 1997) (unpublished memorandum). On May 26, 1998, the Pennsylvania Supreme Court denied allocatur. Commonwealth v. Rainey, 723 A.2d 1024 (Pa. 1998) (table).

On October 21, 1998, Rainey filed a pro se petition for collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann § 9541 et seq. Counsel appointed to represent Rainey in his PCRA matter subsequently filed a letter pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa.

Super. 1988), certifying that he had reviewed the entire record and concluded that there were no meritorious issues to advance before the PCRA court. On July 13, 1999, the PCRA court dismissed Rainey's petition as meritless and permitted counsel to withdraw.

On Jul7 28, 1999, Rainey filed an appeal in the Pennsylvania Superior Court claiming that:

> (1) counsel for co-defendant Darrell Wallace elicited perjured testimony from Commonwealth witness Detective Maahs, and the Commonwealth committed prosecutorial misconduct in failing to correct the alleged false testimony;
>
> (2) the jury instruction regarding accomplice liability was improper; and
>
> (3) both trial and appellate counsel were ineffective for failing to raise the issue that the verdict was against the weight of the evidence in post-verdict motions or on direct appeal.

The Superior Court affirmed the denial of PCRA relief on September 11, 2000, concluding that Rainey's first two (2) claims were waived and his last claim was meritless. Commonwealth v. Rainey, 766 A.2d 891 (Pa. Super. 2000) (table); No. 2362 EDA 1999 (Pa. Super. Sept. 11, 2000) (unpublished memorandum). Rainey did not file a petition for allowance of appeal in the Pennsylvania Supreme Court.

On February 2, 2001, Rainey filed the instant petition for writ of habeas corpus claiming:

(1) the trial court erred in denying his motion for severance;

(2) the trial court erred in denying his motion to limit the examination of a testifying co-defendant with respect to "prior bad acts;"

(3) the trial court improperly permitted a witness to testify to an oral statement given by a co-defendant;

(4) the Commonwealth committed prosecutorial misconduct in failing to correct the alleged perjured testimony of Commonwealth witness Detective Maahs;

(5) the jury instruction regarding accomplice liability was improper; and

(6) both trial and appellate counsel were ineffective for failing to raise the issue that the verdict was against the weight of the evidence in post-verdict motions or on direct appeal.

DISCUSSION:

A. Exhaustion and Procedural Default

Under 28 U.S.C. § 2254 (a), a federal court is required to consider only petitions filed on behalf of individuals in custody pursuant to a state court judgment which are grounded on a violation of the Constitution or the laws or treaties of the United States. Moreover, a federal court, absent unusual circumstances, should not entertain a petition for writ of habeas corpus

unless the petitioner has first satisfied the exhaustion requirement of 28 U.S.C. § 2254. See 28 U.S. C. § 2254(b). A petitioner will not be deemed to have exhausted available state remedies if he had the right under the law of the state to raise, by any available procedure, the question presented. O'Sullivan v. Boerckel, 526 U.S. 838 (1999) ("we ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts"); Picard v. Connor, 404 U.S. 270 (1971). "The exhaustion requirement ensures that state courts have the first opportunity to review convictions and preserves the role of state courts in protecting federally guaranteed rights." Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000) (quoting Caswell v. Ryan, 953 F.2d 853, 856 (3d Cir. 1991)). In order for a claim to be exhausted "[b]oth the legal theory and the facts underpinning the federal claim must have been presented to the state courts . . . and the same method of legal analysis must be available to the state court as will be employed by the federal court." Evans v. Court of Common Pleas, Del. Co., Pa., 959 F.2d 1227, 1231 (3d Cir. 1992). The habeas corpus petitioner has the burden of providing exhaustion of all available state remedies. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C.A. § 2254). We may excuse exhaustion, however, if requiring exhaustion would be futile, i.e., exhaustion is impossible due to procedural default and state law clearly forecloses review of the unexhausted claim. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000) (citations omitted).

Although exhaustion may be excused, we may nonetheless be precluded from reviewing the

merits of claims deemed exhausted. As the Third Circuit has held:

> Claims deemed exhausted because of a state procedural bar are procedurally defaulted, and federal courts may not consider their merits unless the petitioner "establishes 'cause and prejudice' or a 'fundamental miscarriage of justice' to excuse the default."

Werts, 228 F.3d at 192; see also Coleman v. Thompson, 501 U.S. 722, 731 (1991). The "cause and prejudice" standard applies whether the default in question occurred at trial, on appeal, or on state collateral attack. Edwards v. Carpenter, 529 U.S. 446, 451 (2000).

The Supreme Court has delineated what constitutes "cause" for the procedural default: the petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Werts, 228 F.3d at 192-93 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)). With regard to the prejudice requirement, the habeas petitioner must prove "not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. At 193 (citing Carrier, 477 U.S. at 494). This standard essentially requires the petitioner to show he was denied "fundamental fairness" at trial. Id.

In the alternative, if the petitioner fails to demonstrate cause and prejudice for the default, the federal court may also consider a defaulted claim if the petitioner can demonstrate that

failure to consider the claim will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 748. In order to satisfy the fundamental miscarriage of justice exception, the Supreme Court requires that the petitioner show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995) (citing Carrier, 477 U.S. at 496); see Glass v. Vaughn, 65 F.3d 13, 16-17 (3d Cir. 1995), cert. denied, 516 U.S. 1151 (1996) (assuming that the Schlup miscarriage of justice/actual innocence standard applied to noncapital petitioner arguing eligibility for lesser degree of guilt). To satisfy the "actual innocence" standard, a petitioner must show that, in light of new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. Schlup, 513 U.S. at 327; see also Glass, 65 F.3d at 16.

B. Standard for Reviewing Claims on the Merits

The Antiterrorism and Effective Death Penalty Act ("AEDPA") which became effective on April 24, 1996, amended the standards for reviewing state court judgments in federal habeas petitions filed under 28 U.S.C. § 2254. Werts, 228 F.3d at 195. Since Rainey filed his habeas petition on February 2, 2001, we are required to apply the amended standards set forth in the AEDPA to his claims for federal habeas corpus relief. Id. (citing Lindh v. Murphy, 521 U.S. 320, 336 (1997)) (presuming that a federal habeas court is to apply the amended standards set forth in the AEDPA when a petition is filed after the effective date of the AEDPA).

The AEDPA increases the deference federal courts must give to the factual findings and legal

determinations of the state courts. Id. At 196 (citing Dickerson v. Vaughn, 90 F.3d 87, 90 (3d Cir. 1996)). Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may only be granted if (1) the state court's adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the supreme Court of United States;" or if (2 the adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. Werts, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court expounded upon this language in Williams v. Taylor, 529 U.S. 362 (2000). In Williams, the Court explained that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Hameen v. State of Delaware, 212 F.3d 226, 235 (3d Cir. 2000) (citing Williams, 529 U.S. at 389-390). The Court in Williams further stated that "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. The "unreasonable application" inquiry requires the habeas court to "ask whether the

state court's application of clearly established federal law was objectively unreasonable." Id. (citing Williams, 529 U.S. at 388-389). "In further delineating the 'unreasonable application of' component, the supreme Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable. Werts, 228 F.3d at 196 (citing Williams, 529 U.S. at 389).

Claim One (1): Motion for Severance

In his first claim, Rainey alleges that the trial court erred in failing to grant his motion to sever his trial from that of his co-defendants because they allegedly presented antagonistic defenses. Respondents contend that this claim is unexhausted because Rainey failed to present to the state courts the legal theory that he advances in this federal habeas petition; namely, that the trial court's ruling denied him due process of law under the Fourteenth Amendment. See Resp't Answer at 10.

We agree that this claim is procedurally defaulted because it was raised exclusively as a matter of state law to the state courts. Duncan v. Henry, 513 U.S. 364, 366 (1995) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court."). In order to satisfy the exhaustion requirement of 28 U.S.C. § 2254(d), a petitioner must "fairly present" federal claims to state courts before bringing them in federal court.

McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999) (citing Duncan, 513 U.S. 364; Picard, 404 U.S. at 275; Lambert, 134 F.3d at 513). To "fairly present" a claim to a federal habeas court, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. McCandless, 172 F.3d at 261 (citing Anderson v. Harless, 459 U.S. 4, 6 (1982) and Picard, 404 U.S. 270). It is not sufficient that a "somewhat similar state-law claim was made." Id. (citing Harless, 459 U.S. at 6).

The Third Circuit has noted some of the ways in which petitioners may communicate that they are asserting a federal claim without explicitly referencing specific portions of the federal constitution or statutes. McCandless, 172 F.3d at 261. The Court observed that the required message can be conveyed through:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Id. (citing Evans, 959 F.2d at 1232).

In the instant matter, Rainey did not, by these means or any other, serve fair notice that he was asserting a claim of federal constitutional dimension. McCandless, 172 F.3d at 262. Rainey's claim in state court made no reference to a constitutional or federal right and primarily cited state cases considering state law without

employing any constitutional analysis.[2] Id. Furthermore, Rainey's Pennsylvania state court briefs do not assert this claim in "terms so particular as to bring to mind" a constitutional right, noir do they "allege a pattern of facts well within the mainstream of constitutional litigation." Id.; Keller v. Larkins, 251 F.3d 408, 414-15 (3d Cir. 2001) (holding that passing references in state court to the concept of a "fair trial" were insufficient to give the state courts fair notice that a habeas petitioner was asserting a federal constitutional claim). Thus, we conclude that Rainey did not fairly present this claim to Pennsylvania's courts. McCandless, 172 F.3d at 262-63 (citing Duncan, 513 U.S. at 366).

We find, however, that exhaustion should be excused for this claim pursuant to 28 U.S.C. § 2254(b)(I), because a return to state court would be futile due to "an absence of available State corrective process." Lines, 208 F.3d at 162. The only way in which Rainey could present this claim in the state court at this time is by filing another PRA petition. See Szuchon v. Lehman, 273 F.3d 299, 324 n.14 (3d Cir. 2001). However, any such petition would be time-barred by the PCRA's statute of limitations.[3] As a result, exhaustion would be futile and is excused.

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[2] Although Rainey did cite one federal case in support of this claim in his state court brief, United States v. Berkowitz, 662 F.2d 1127 (5th Cir. 1981), the case analyzed the doctrine of severance for inconsistent defenses under Federal Rule of Criminal Procedure 14; it did not employ constitutional analysis on this issue.

[3] Pursuant to the amended PCRA, effective January 16, 1996, collateral actions must be filed within one (1) year of the date the conviction at issue becomes final. 42 Pa. Cons. Stat. Ann. § 9545(b)(1); see also, e.g., Lines, 208 F.3d at 164

Although we recommend that exhaustion be excused, Rainey is considered to have procedurally defaulted his federal due process claim because state procedural rules bar him from seeking further relief in state courts. Keller, 251 F.3d at 415. A federal court may not consider the merits of such claims unless the petitioner establishes "cause and prejudice" to excuse his default. Id. (citing Coleman, U.S. at 750).

Rainey has not even attempted to provide this court with an explanation for his failure to fairly present this claim to the state courts. As a result, he has not shown cause to excuse his

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n.17 (noting that the Pennsylvania Supreme Court has held that the time restrictions for seeking relief under the PCRA are jurisdictional) (citing Commonweath v. Banks, 726 A.2d 374 (Pa. 1999)). For purposes of the PCRA, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of Pennsylvania and the Supreme Court of the United States, or at the expiration of time for seeking the review. 42 Pa. Cons. Stat. Ann § 9545(b)(3). As previously noted, the Pennsylvania Supreme Court denied Rainey's petition for allocatur May 26, 1998, and Rainey failed to petition for a writ of certiorari in the United States Supreme Court; therefore, his conviction became final on August 24, 1998, when the time for seeking an appeal in the United States Supreme Court expired. Because Rainey's conviction became final over three (3) years ago, the PCRA statute of limitations would preclude Rainey from presenting the instant claim in a PCRA petition. 42 Pa. Cons. Stat. Ann. § 9545(b)(1). Moreover, although there are three (3) exceptions to the PCRA's statute of limitations, 42 Pa. Cons. Stat. Ann. § 9545(b)(1)(i), (ii), (iii), Rainey fails to allege any of the limited circumstances upon which an exception would be granted.

procedural default.[4] Moreover, because Rainey makes no colorable showing of innocence, he has failed to demonstrate that a miscarriage of justice will result if his claim is not reviewed. Coleman, 501 U.S. at 748; Schlup, 513 U.S. at 327 (citing Carrier, 477 U.S. at 496); see Glass, 65 F.3d at 16-17. Therefore, this claim must be dismissed as procedurally defaulted.

Even if we were to find that this claim was not procedurally defaulted, this court would find that it is without merit. Rainey contends that the trial court should have granted his motion to sever because his defenses of presumption of innocence, mistaken identity, and alibi were antagonistic to co-defendant Riley's defense of duress.

Not all trials are condemned where co-defendants have antagonistic defenses. See Zafiro v. United States, 506 U.S. 534, 537-40 (1993 (declining to adopt a bright-line rule that severance is required "whenever co-defendants have conflicting defenses"); see generally Richardson v. Marsh, 481 U.S. 200, 209-10 1987) (joint trials "play a vital role in the criminal justice system" by promoting efficiency and serving the interests of justice by avoiding the scandal and inequity of inconsistent verdicts). Improper joinder of claims is a constitutional violation "only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial. United States v. Lane, 474 U.S. 438, 446 n.8 (1986). Fundamental unfairness can be

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[4] Because no cause has been demonstrated, the court need not address the prejudice requirement. Engle v. Isaac, 456 U.S. 107, 134 n.43 (because petitioner lacked cause for default, the court need not consider whether he also suffered actual prejudice).

shown where the defenses presented by two (2) defendants are truly "mutually exclusive, such that the jury could not believe the core of one defense without discounting entirely the core of another." Laird v. Horn, 159 F.Supp.2d 58, 96-97 (E.D. Pa. 2001 (citing United States v. Dirden, 38 F.3d 1131, 1141 (10th Cir. 1994)); see also McCloskey v. Ryan, 1991 WL 165076, at *4 (E.D. Pa. Aug. 23, 1991 (antagonistic defenses are sufficiently prejudicial only when they are irreconcilable and mutually exclusive).

Rainey asserted an alibi defense at trial, claiming that he did not participate in the events of June 1, 1994. Riley set forth a duress defense, claiming that he participated in the crimes because a man named "Geeter," to whom Riley owed $3,000.00, allegedly threatened Riley and his family if he did not commit the robbery. (N.T. 5/18/95, 14). In finding that trial court properly denied Rainey's motion to sever, the state court determined that the presentation of the co-defendants' defenses "did not require the jury to believe the essence of Riley's defense while disbelieving [Rainey's] defense."[5] Commonwealth v. Rainey, No. 3871 Phila. 1995, at 4-6. We agree. Riley's defense of duress by someone other than his co-defendants did not preclude the jury from accepting Rainey's alibi defense. See generally United States v. Swanson, 572 F.2d 523, 529 5th Cir., cert. denied, 439 U.S. 849 (1978) (no

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[5] In analyzing this claim, the state court also determined that a joint trial between Rainey and his co-defendants was advisable because the crimes charged stemmed from the same acts and much of the same evidence was necessary or applicable to all of the defendants. Commonwealth v. Rainey, o. 3871 Phila. 1995, at 5. The court also pointed out that the Commonwealth tried the defendants for, among other things, criminal conspiracy.

severance required because defense of noninvolvement did not "preempt" defense of lack of intent). Accordingly, this aspect of Rainey's claim must be denied.

Rainey also argues, however, that the joint trial led to the admission of evidence that could not have been used against him had he been tried alone, and that this denied him the specific due process right to be tried only on evidence admissible against him. In support of this argument, Rainey points to the admission of testimony regarding Riley's prior crimes and an oral statement Riley made to a police detective.[6]

Rainey firs argues that the admission of evidence regarding his co-defendant Riley's prior crimes caused an emotional reaction in the jury that resulted in "significant prejudicial spill-over" to himself. See Pet'r Mem. Of Law at 13, 18. We find this claim meritless. As the state court held, the disputed testimony "had nothing to do with [Rainey]" and was admitted in an attempt to discredit Riley's defense. Commonwealth v. Rainey, No. 3871 Phila. 1995, at 6-7. Furthermore, the trial court specifically instructed the jury that Riley's prior robberies were mentioned solely for the purpose of challenging his defense of duress. Id. At 7; cf. Zafiro, 506 U.S. at 539 (rather than granting a severance, "less drastic measures, such as

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[6] Rainey has provided this court with the brief from his direct appeal to the Superior Court. See Pet'r Letter, 2/21/02, Ex. A. In that brief, Rainey incorporated these arguments into his claim that the trial court erred in failing to grant his motion to sever. Id. Although the Superior Court did not specifically address these claims within the context of the motion to sever, it did ultimately review the underlying merit of these issues in separate claims.

limiting instructions, often will suffice to cure any risk of prejudice"). As a result, we do not believe that the admission of this testimony resulted in a fundamentally unfair trial.

Rainey next alleges that he was denied a fair trial by Commonwealth witness Detective Maah's testimony regarding co-defendant Riley's oral statement that Rainey had been the mastermind of the robbery.[7] (N.T. 5/19/95, 58-60). As the state court noted, this evidence was admitted for purposes of impeaching Riley's testimony and, as a result, it was at the periphery and not the core of defenses presented by the defendants in this case. Commonwealth v. Rainey, No. 3871 Phila. 1995, at 8. Also, the state court determined that the admission of this testimony was harmless in light of the uncontradicted evidence of guilt at trial. Id. Specifically, the court found that:

> the Commonwealth's evidence included the testimony of two [2] eyewitnesses who testified that they saw [Rainey] and his cohorts rob the store and kill Mr. Kang. Also, at [Rainey's] home, the police found merchandise from the store and bullet casings that matched those bullets used in the robbery.

Id. Ultimately, we agree that the admission of this evidence was not unduly prejudicial given the

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[7] The trial court found that Riley never implicated Rainey "in any way" at trial. Commonwealth v. Rainey, C.P. 9407-0834, at 4 (Court of Common Pleas, Feb. 4, 1997).

overwhelming evidence which was properly admitted against Rainey.[8]

Rainey, therefore, has failed to demonstrate that the denial of his motion to sever resulted in prejudice great enough to render his trial fundamentally unfair. As a result, we find that the state court decision on this matter did not result in a decision that was contrary to, or involved an unreasonable application of, federal law as established by the Supreme Court of the United States. Accordingly, this claim must be denied.

Claims Two (2) and Three (3): Admission of Prior Bad Acts and Hearsay Testimony

In his second claim, Rainey argues that the trial court erred in permitting the cross-examination of co-defendant Riley regarding Riley's prior bad acts; and in his third claim, Rainey alleges that the trial court erred in allowing Commonwealth witness Detective Maahs to testify as to Riley's statement implicating Rainey. Respondents contend that these claims are unexhausted and procedurally defaulted because they were presented to the state court solely as a matter of state law.

We agree that the federal equivalent of claims two (2) and three (3) were never "fairly presented" to the state courts. Duncan, 513 U.S. at 366; Keller, 251 F.3d at 415. Rainey's state court briefs did not assert claims of federal constitutional dimension, but rather cited only

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[8] We note, however, that we revisit this issue tangentially in our discussion of claim six (6) when we discuss the potential impact this testimony had on the jury's finding of specific intent for first degree murder.

state cases considering state evidentiary law. McCandless, 172 F.3d at 262. Moreover, the claims of evidentiary error he presented to the state courts did not "bring to mind" a constitutional right or allege facts which are within the "mainstream of constitutional litigation." Id. Accordingly, we conclude that these claims are unexhausted because they were not fairly presented to the state courts. Id. At 262-63 (citing Duncan, 513 U.S. at 366).

As previously discussed, a return to state court would be futile at this time. See 42 Pa. Cons. Stat. Ann. § 9545(b)(1). As a result, we find that exhaustion should be excused. 28 U.S.C. § 2254(b)(1). Because, however, state procedural rules bar Rainey from seeking further relief in the state courts, these claims are also deemed procedurally defaulted. Keller, 251 F.3d at 415. Rainey has not shown any cause to excuse his procedural default, nor has demonstrated that a miscarriage of justice would occur if his claims are not reviewed. Coleman, 501 U.S. at 748; Schlup, 513 U.S. at 327 (citing Carrier, 477 U.S. at 496). Consequently, claims two (2) and three (3) must be dismissed as procedurally defaulted.

Claims Four(4) and Five(5):
Prosecutorial Misconduct and Trial
Court Error in Jury Instructions

In his fourth (4th) and fifth (5th) claims, Rainey claims that the Commonwealth committed prosecutorial misconduct and that the trial court gave an erroneous jury instruction. Rainey presented these claims in his Superior Court appeal from the denial of PCRA relief; however, the state court failed to review the claims based upon a state procedural bar. Specifically, the Superior Court found that the claims were waived

because "they were not raised on direct appeal." Commonwealth v. Rainey, No. 2362 EDA 1999, at 4.

A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion because there are no state remedies any longer "available to him. Coleman, 501 U.S. at 732. Because waiver of these issues have barred state review of the instant claims, I find that Rainey has satisfied the technical requirements for exhaustion.

Although I find that the exhaustion requirement has been satisfied, these claims are also procedurally defaulted. Federal courts will not review a state court decision involving a question of federal law if the state court decision is based on state law, even a state procedural law, that is independent of the federal question and adequate to support the judgment. Coleman, 501 U.S. at 727-31; see also Neely v. Zimmerman, 858 F.2d 144 (3d Cir. 1988) (Pennsylvania's requirement that an issue be presented in post-trial motions for it to be raised on appeal is an "independent and adequate" state procedural ground for denying a claim). As the Supreme Court has explained, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism:

> In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own

> mistakes is respected in all federal habeas cases.

Edwards, 529 U.S. at 452-53 (citing Coleman, 501 U.S. at 732).

As previously noted, federal habeas review of these claims are therefore barred unless the petitioner can demonstrate cause for the default and actual prejudice resulting therefrom. Werts, 228 F.3d at 192; Coleman, 501 U.S. at 750; Carrier, 477 U.S. 478. Rainey has not established either cause or prejudice for these claims.[9] Furthermore, because Rainey makes no showing of "actual innocence," he has failed to demonstrate that a miscarriage of justice will result if his claims are not reviewed. Schlup, 513 U.S. at 327. Therefore, these claims must be dismissed as procedurally defaulted.

Claim Six (6): Ineffective Assistance of Counsel

In his last claim, Rainey presents a layered claim of ineffective assistance of counsel. Specifically, he argues that trial and appellate counsel were ineffective for failing to raise the issue that the verdict was against the weight of

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[9] Any claim that Rainey would make arguing that his default is due to counsel's failure to properly present these claims on direct appeal must be dismissed. A claim of ineffective assistance of counsel constitutes "cause" for procedural default only if the claim was presented to the state courts independently prior to its use to establish cause. Edwards, 529 U.S. 466 (citing Carrier, 477 U.S. at 488-89). Because Rainey failed to present a claim of ineffective assistance of direct appellate counsel to the state courts, such a claim cannot constitute "cause" for his default.

the evidence. In support thereof, he alleges that the Commonwealth failed to prove beyond a reasonable doubt that he shared a specific intent to kill with Riley, the co-defendant who fired the fatal shot.[10]

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[10] Rainey failed to submit this claim to the Pennsylvania Supreme Court in his PCRA appeal; however, despite Respondents argument to the contrary, we do not find that his failure to do so renders the claim unexhausted. On May 9, 2000, the Pennsylvania Supreme Court issued Order No. 218 which states that a petition for allocatur is not necessary for exhaustion prior to commencing federal habeas proceeding. See In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, No. 218 Judicial Administration Docket No. 1 (Pa. May 6, 2000) ("in all appeals from criminal convictions. . .a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error"); see also O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999) (acknowledging an exception to the exhaustion requirement when the state has provided that a specific state remedy is "unavailable"). Order No. 218 sends a clear directive to petitioners that they need not file a Pennsylvania Supreme Court appeal in order to complete a full round of its ordinary review process. Because the Superior Court affirmed the denial of Rainey's PCRA petition on September 11, 2000, more than four (4) months after the Pennsylvania Supreme Court issued Order No. 218, this Order is applicable to Rainey's case. See Wenger v. Frank, 266 F.3d 218, 225 (3d Cir. 2001) (holding that Order 218 does not apply retroactively, but failing to decide if filing a petition for discretionary review with the Pennsylvania Supreme Court is now "part of the ordinary appellate review process" in Pennsylvania). Although Respondents contend that this state court Order violates the Supremacy Clause of the United States Constitution because it directs federal courts on a matter of federal

Rainey's claim of ineffective assistance of counsel is governed by Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court set forth the standard for a petitioner seeking habeas relief on the grounds of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant

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habeas law (i.e. – exhaustion of available state court remedies), we concur with the Honorable Franklin S. Van Antwerpen's conclusion that the Order does not violate the Supremacy Clause because it is simply a declaration by the Pennsylvania Supreme Court that discretionary review is "unavailable." Mattis v. Vaughn, 128 F.Supp.2d 249, 259 (E.D. Pa. 2001). Therefore, in accordance with published opinions of this district court, we conclude that Rainey's failure to appeal the most recent denial of PCRA relief to the Pennsylvania Supreme Court does not preclude this court from reviewing the Superior Court's disposition of that claim. Id. (holding that "Order 218 removes a petition for discretionary review from one full round of Pennsylvania's ordinary review process and therefore makes discretionary review unavailable for the purpose of the exhaustion requirement in § 2254"); Mehta v. Walter, 2001 WL 894047 (E.D. Pa. Aug. 1, 2001) (Padova, J.) (accord); see also Blasi v. Attorney General of Com. Of Pennsylvania, 120 F.Supp.2d 451, 466 (M.D. Pa. 2000), aff'd 275 F.3d 33 (3d Cir. 2001 (table), cert. denied, 122 S.Ct. 1540 (2002)("the order of the Supreme Court of Pennsylvania waives the exhaustion doctrine insofar as the doctrine requires a petitioner under § 2254 to present claims to the Supreme Court of Pennsylvania in a petition for allocatur prior to presenting them in federal court").

> must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. At 687.

Because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," a court must be "highly deferential" to counsel's performance and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. At 689. In determining prejudice, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. Id. At 695.

"It is past question that the rule set forth in Strickland qualifies as 'clearly established Federal law, as determined by the Supreme court of the United States.'" Williams, 529 U.S. at 391. Thus, Rainey is entitled to relief if the Pennsylvania courts' decision rejecting his claim of ineffective assistance of counsel was either "contrary to, or involved an unreasonable application of," that established law.[11] Id.

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[11] Upon analyzing the law set forth in the Superior Court's decision, we find that the state court did not apply a rule that contradicts the Supreme Court's holding in Strickland. See Werts, 228 F.3d at 204. The Pennsylvania Supreme Court has held that the Pennsylvania standard judging ineffectiveness claims is identical to the ineffectiveness standard enunciated by the United States Supreme Court

A. Deficiency of Trial Counsel's Performance

As previously noted, Rainey claims that trial counsel was ineffective for failing to argue that the verdict of first degree murder was against the weight of the evidence because the Commonwealth failed to prove beyond a reasonable doubt that he shared the specific intent to kill.[12] It has long been established that due process requires that a person can only be convicted of the crime with which he is charged by proof of every element of the criminal offense beyond a reasonable doubt.[13] Jackson v. Virginia, 443 U.S. 307, 316 (1979); In re Winship, 397 U.S. 358, 364 (1970). As explained by the Third Circuit, under applicable Pennsylvania law, an accomplice or co-conspirator in a crime during which a killing occurs may not be convicted of first degree murder unless the Commonwealth

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in Strickland. Werts, 228 F.3d at 203 (citing Commonwealth v. Pierce, 527 A.2d 973, 976-77 (Pa. 1987)).

[12] We note that Rainey's underlying argument is that weight of the evidence did not support the jury's verdict, as opposed to the argument that the evidence was insufficient to sustain his conviction. See Tibbs v. Florida, 457 U.S. 31, 42-45 (1982) (distinguishing a weight of the evidence argument from a sufficiency of the evidence argument). A federal habeas court has no power to grant habeas corpus relief because it finds that a state conviction is against the "weight" of the evidence. Smith v. Vaughn, 1997 WL 338851, at *8 (E.D. Pa. June 17, 1997). Notwithstanding, such a claim is cognizable where, as here, it is raised within the context of a claim of ineffective assistance of counsel.

[13] Typically, Jackson v. Virginia is the leading case in the analysis of a sufficiency of the evidence claim. The case is relevant here, however, because Rainey alleges that the Commonwealth failed to prove specific intent, a requisite element of first degree murder.

proves that he harbored the specific intent to kill. Smith v. Horn, 120 F.3d 400, 410 (3d Cir. 1997); see 18 Pa. Cons. Stat. Ann. § 2502(a) (West 1994); see also Everett v. Beard, 2002 WL 849459, at *11 (3d Cir. May 2, 2002); Commonwealth v. Bachert, 453 A.2d 931, 935 (Pa. 1982), cert. denied, 460 U.S. 1043 (1983). The Commonwealth need not prove that the defendant actually performed the killing, see Commonwealth v. Bachert, 412 A.2d 580, 583 (Pa. Super. 1979), aff'd in part, rev'd on other grounds in part, 453 A.2d 931 Pa. 1982, but it must prove he intended for the killing to occur.[14] Id. Whether an accomplice possessed the same intent to kill as his co-conspirator may be inferred from words, conduct, the attendant circumstances and all reasonable inferences that follow from them. Commonwealth v. Rios, 721 A.2d 1049, 1053 (Pa. 1998.

A trial court can "award a new trial on the basis that the verdict is against the weight of the evidence if the verdict is so contrary to the evidence as to shock one's sense of justice." Commonwealth v. Rainey, No. 2362 EDA 1999, at 5 (citing Commonwealth v. Gibson, 720 A.2d 473, 480 (Pa. 1998)).

In reviewing this claim, the state court concluded that counsel was not ineffective for failing to argue that the verdict was against the

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[14] In contrast, felony-murder, which constitutes murder of the second degree in Pennsylvania, does not require specific intent. See 18 Pa. Cons. Stat. Ann. § 2502(b) (West 1994 ("[a] criminal homicide constitutes murder in the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony"). A conviction for murder of the second degree carries a sentence of life imprisonment. Id. At § 1102(b) (West 1994) ("Sentence for murder").

weight of the evidence because "there was overwhelming evidence of guilt." Commonwealth v. Rainey, No. 2362 EDA 1999, at 6. In discussing this evidence of guilt, the state court noted that "[t]he evidence included the testimony of two [2] eyewitnesses who testified that they saw Rainey and the co-defendants commit the crime. Id. The court also pointed out that "the police found store merchandise and matching bullet casings in Rainey's home." Id.

We do not believe that intent to kill could reasonably have been inferred from the evidence set forth by the Superior Court. Because it is undisputed that Rainey's co-defendant, Riley, shot the victim, it was necessary for the Commonwealth to establish that Rainey possessed the same intent to kill as his co-conspirator from words, conduct, the attendant circumstances and all reasonable inferences that flowed therefrom. Rios, 721 A.2d at 1053. It is true that eyewitness testimony established that Rainey assisted with the robbery and that store merchandise and a bullet were found in Rainey's bedroom. However, contrary to the state court's characterization of this evidence as "overwhelming evidence of guilt" of first degree murder, we conclude that this evidence does not establish that Rainey possessed the requisite intent for first degree murder. Cf. Commonwealth v. Bachert, 453 A.2d 931, 935 (Pa. 1982), cert. denied, 460 U.S. 1043 (1983) (defendant's repeated boasting statements after shooting of victim by his companion that "We shot the guy," permitted inference by jury of existence of requisite intent to kill, sufficient to sustain conviction for murder of the first degree); Commonwealth v. Coley, 504 A.2d 1286 (Pa. Super. 1986) (first degree murder instruction justified because intent proven by the fact that

defendant provided gun which was used to kill victim, was present at time of killing, and took part in attempting to dispose of weapon).

Respondents, however, point to two(2) other sources of evidence, not mentioned by the state court, in support of the conclusion that the weight of the evidence supported a conviction for first degree murder. They first contend that "[t]he evidence established that [Rainey] recruited and provided the murder weapon to co-defendant Riley who fired the fatal shot. See Resp't Answer at 22. Second, Respondents point to evidence of Rainey's flight when he encountered law enforcement agents as further circumstantial evidence of guilt.

In their first argument, Respondents are presumably referring to Detective Maah's testimony that co-defendant Riley told him that Rainey was the mastermind of the robbery and provided the gun to Riley.[15] (N.T. 5/19/95, 58). We are troubled by this argument, however, because this aspect of Detective Maah's testimony was solely offered to impeach co-defendant Riley's testimony, and was not admitted for substantive purposes. Indeed, in reviewing a different claim of evidentiary error, the Superior Court specifically stated as much finding that: "[a]lthough [Detective Maah's] testimony implicated [Rainey] and [Rainey's] counsel did not

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[15] Respondents did not cite the source for this evidence. Moreover, this court is not aware of any other evidence which would lead the jury to believe that Rainey was the "mastermind" or provided the gun to Riley. In fact, as previously noted, the trial court specifically found that co-defendant Riley never implicated Rainey "in any way" at trial. Commonwealth v. Rainey, .P. 9407-0834, at 4 (Court of Common Pleas, Feb. 4, 1997).

request a cautionary instruction, the admission of the testimony was for impeachment, not substantive, purposes . . . [therefore,] any error resulting from the admission of this testimony was harmless." Commonwealth v. Rainey, No. 3871 Phila. 1995, at 8. To the extent that the jury relied upon this evidence in finding specific intent to kill, they did so in error.[16]

As to Respondents' second piece of evidence not considered by the state court, we agree that evidence of flight may indicate consciousness of guilt. However, we find that it does not establish that Rainey had the specific intent for first degree murder.

As a result, we do not believe that the state court reasonably applied the Strickland standard when it concluded that counsel was not deficient for failing to raise a weight of the evidence argument.

B. Prejudice

Having concluded that counsel was deficient for failing to argue that Rainey's first degree murder conviction was against the weight of the evidence, it is also necessary to determine whether Rainey can demonstrate prejudice. The standard established in Strickland for prejudice is whether there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. Everett, 2002 WL 849459, at *14 (citing Strickland, 466 U.S. at 694). In light of the lack of evidence of specific intent in the instant case, we believe that there is a reasonable possibility that the trial

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[16] As previously noted, no limiting instruction was given to the jury in closing instructions regarding this evidence.

court would have granted a new trial if counsel had argued that the verdict of first degree murder was against the weight of the evidence. As a result, we find that Rainey's was prejudiced by trial counsel's deficient performance.

C. Ineffective Assistance of Appellate Counsel

Because this is a layered claim of ineffective assistance of counsel, this court must next determine whether Rainey's right to effective assistance of counsel on direct appeal, see Evitts v. Lucey, 469 U.S. 387, 393-94 (1985), was violated when the attorney who represented him at that stage failed to argue that trial counsel had rendered ineffective assistance regarding a weight of the evidence claim. In order to satisfy the first prong of the Strickland test, Rainey is required to show that appellate counsel's failure to raise the abovementioned argument on appeal fell outside "the wide range of reasonable professional assistance; that is, [he would have to] overcome the presumption that, under the circumstances, the challenged action 'might be considered sound [appellate] strategy.'" Buehl v. Vaughn, 166 F.3d 163, 173 (3d Cir. 1999) (citing Strickland, 466 U.S. at 689). "One element of effective appellate strategy is the exercise of reasonable selectivity in deciding which arguments to raise." Id.; see Smith v. Murray, 477 U.S. 527, 536 (1986) (stating that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of appellate advocacy") (quoting Jones v. Barnes, 463 U.S. 745, 751-752 (1983)).

In this case, again given the lack of evidence of intent, we do not believe that it was

reasonable for appellate counsel to conclude that it was unlikely that he could satisfy Strickland's cause and prejudice test on a weight of the evidence claim and that it was therefore strategically unwise to select these arguments on direct appeal. Moreover, we believe that if direct appellate counsel had raised and fully briefed the foregoing issue, then there is a reasonable possibility that the result of Rainey's appeal would have been different.[17] Consequently, this court concludes that Rainey's appellate counsel also rendered constitutionally ineffective assistance. In light thereof, we conclude that Rainey's conviction for first degree murder is constitutionally infirm and recommend granting the writ with regard to this claim.

D. Remedy

The Third Circuit has stated that:

> federal habeas power is limited, first, to a determination of whether there has been an improper detention by virtue of the state court judgment; and second, if we find such an illegal

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[17] We acknowledge that the appellate courts ultimately denied this claim on collateral review. However, Rainey's argument to the Superior Court on collateral appeal was submitted without the benefit of counsel because the PCRA court had permitted the withdrawal of appointed counsel. The fact that Rainey did not have counsel at this point is not a constitutional violation, Pennsylvania v. Finley, 481 U.S. 551, 558 (1987); however, we believe that if this argument had been presented on direct appeal, when Rainey had the constitutional right to effective assistance of counsel, then it would been presented in a more persuasive, potentially successful manner. Consequently, the failure to raise the claim *on direct appeal* prejudiced Rainey.

> detention, to ordering the immediate release of the prisoner, conditioned on the state's opportunity to correct constitutional errors that we conclude occurred in the initial proceedings.

Henderson v. Frank, 155 F.3d 159, 168 (3d Cir. 1998). Because we find that Rainey's conviction and sentencing for first degree murder were the result of constitutionally deficient assistance of counsel, there is no relief short of a new trial and sentencing that would remedy the constitutional error. Therefore, we recommend the issuance of the writ unless the Commonwealth grants Rainey a new trial and sentencing within 180 days.[18]

Therefore, I make the following

RECOMMENDATION

AND NOW, this 19th day of June, 2002, IT IS RESPECTFULLY RECOMMENDED that the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 be GRANTED and that

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[18] In reaching our conclusion, we echo the Third Circuit's observation in Smith v. Horn: We express no opinion whether, following the grant of habeas relief, the Commonwealth may properly move to resentence [Rainey] for any lesser included homicide (such as felony murder or manslaughter where specific intent is not an element of the crime). Nor do we express an opinion concerning the propriety of the Commonwealth moving to resentence [Rainey] on the other crimes for which he was convicted along with first-degree murder. 120 F.3d 400, 419 n.6 (3d Cir. 1997).

Petitioner Kyle Rainey be released from custody pertaining to his conviction on the charge of first degree murder, unless within 180 days he is retried on the first degree murder charge. IT IS FURTHER RECOMMENDED that the issuance of an Order granting the writ of habeas corpus be stayed pending any appeal.

PETER B. SCUDERI
UNITED STATES
MAGISTRATE JUDGE

Appendix D

§ 2254. State custody; remedies in Federal courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.